Supreme Court, U.S.
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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LEILA JEANNE HILL, *et al.*, *Petitioners*,

v.

THE STATE OF COLORADO,
ROY ROMER, GOVERNOR, *et al.*,
Respondents.

Petition for Writ of Certiorari to the Court of Appeals of the State of Colorado

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under a new Colorado criminal law, no one may distribute leaflets, orally counsel, educate or protest, or display signs, within eight feet of another person, while the speaker is within one hundred feet of the entrance to a medical facility, unless the speaker first seeks and gets consent from the other person. C.R.S. § 18-9-122(3). Either the failure to seek consent or the denial of consent make communication within eight feet of someone else a crime under Colorado's "Bubble Zone" law. The following questions are presented:

1. Is a statutory obligation to obtain consent before exercising constitutionally-protected expressive rights in a traditional public forum inconsistent with this Court's decision in *Madsen v. Women's Health Center, Inc.*, 512 U.S. ___, 114 S. Ct. 2516 (1994), striking down an injunctive "consent to speak" requirement?

2. Does C.R.S. § 18-9-122(3) violate petitioners' First and Fourteenth Amendment rights to freedom of speech, press and assembly?

3. Does C.R.S. § 18-9-122(3) violate petitioners' Fourteenth Amendment rights to equal protection of the law?

PARTIES

The following persons were appellants in the proceedings below and are petitioners in this Court:

> Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr.

The following persons or entities were appellees in the proceedings below and are respondents in this Court:

> The State of Colorado, Roy Romer, Governor; David J. Thomas, in his official capacity as District Attorney for the First Judicial District of the State of Colorado; The City of Lakewood, Colorado; and, Gale Norton, in Her Official Capacity as Attorney General of the State of Colorado.

None of the petitioners is a corporation. *See* Rule 29.6.

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In The
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LEILA JEANNE HILL, *et al.*

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Petition for Writ of Certiorari to the Court of Appeals of the State of Colorado

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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The decision of the Colorado Court of Appeals is reported as *Hill v. City of Lakewood*, 911 P.2d 670 (Colo. Ct. App. 1995). App. 1a. The Order denying the Petition for Rehearing is unpublished. App. 20a. The Order of the Colorado Supreme Court denying the Petition for a Writ of Certiorari to the Colorado Court of Appeals is unpublished. App. 19a. The judgment of the trial court is unpublished. App. 10a.

JURISDICTION

The Colorado Court of Appeals issued its opinion affirming the judgment of the trial court on July 13, 1995, and issued its order denying the petition for rehearing on August 17, 1995. The Colorado Sureme Court denied the

petition for a writ of certiorari on February 26, 1996. This Court has jurisdiction under Title 28 U.S.C. § 1257.

CONSTITUTIONAL and STATUTORY PROVISIONS

The first amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

Section one of the fourteenth amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

C.R.S. 18-9-122 states, in pertinent part:

> (1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be

balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowlingly obstructing another person's entry to or exit from a health care facility.

* * *

(3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

(4) For the purposes of this section "health care facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.

* * *

STATEMENT OF THE CASE

The Colorado Court of Appeals upheld the constitutionality of Colorado Revised Statutes § 18-9-122(3), a new statute making it a criminal offense in Colorado to distribute literature, display picket signs, or orally protest, counsel or educate, under the circumstances contemplated in

the statute. This the appeals court did even while acknowledging that the statute directly restricted speech in traditional public forum properties (sidewalks and streets). C.R.S. § 18-9-122(3) imposes criminal liability on anyone within 100 feet of the entrance door to a health care facility who, without first obtaining permission to do so and while within eight feet of another person, passes a leaflet to, displays a sign to, or directs oral protests, counselling or education to that other person. *Hill v. City of Lakewood*, 911 P.2d 670 (Colo. Ct. App. 1995). This statutory provision is functionally similar to the "consent to speak" provision struck down by this Court in *Madsen v. Women's Health Center, Inc.* 512 U.S. ___, 114 S. Ct. 2516 (1994).

A. *Statement of Facts Material To Consideration of the Questions Presented.*

Petitioners are "sidewalk counselors" – they offer abortion-bound women alternatives to abortion. R. 4, 112-14, 148-49, 151-53.[1] They inform passersby about abortion and abortion alternatives orally, by sign displays, and by leafletting. R. 4, 112-14, 148-49, 151-53. They make cards, leaflets, and pamphlets, R. 4, 112-14, 148-49, 151-53, and distribute them near businesses where abortions are performed. R. 4, 112-14, 148-49, 151-53. They make posters about abortion to display in public. R. 4, 112-14, 148-49, 151-53. Some posters bear words, others pictures. Petitioners have counseled or protested in various places around Colorado. R. 113, 149, 151-52.

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1. References herein are made to the record transmitted from the Jefferson County District Court to the Colorado Court of Appeals. Those references are indicated as "R.__."

On April 19, 1993, C.R.S. § 18-9-122(3), became effective.[2] Pursuant to C.R.S. § 18-9-122(3), whenever a person is within 100 feet of the entrance door to a medical facility, that person must seek and get consent from any other person before approaching within eight feet of that person to hand a leaflet, display a sign, or engage in oral education, counselling or protest. Failure to seek consent before speaking, displaying signs, or leafletting is a misdemeanor criminal offense, *id.*, as are speaking, displaying signs, or leafletting when consent has been denied, *id.*

Officials of the City of Lakewood knew of the enactment of C.R.S. § 18-9-122(3). The City, its legal counsel, and its law enforcement personnel planned and threatened to enforce the provisions of the statute. R. 4, 32, 42, 270. Legal counsel for the Lakewood Police prepared a guidance memorandum on enforcement of C.R.S. § 18-9-122(3). R. 270.

Before enactment of C.R.S. § 18-9-122(3), Petitioners regularly voiced their views on human abortion on public sidewalks and ways within 100 feet of the entrance doors to abortion facilities. R. 4, 112-14, 148-49, 151-53. They advised women near abortion businesses about alternatives to abortion. Before C.R.S. § 18-9-122(3), they spoke without fear of censorship, R. 4, 112-14, 148-49, 151-53, or prosecution, R. 4, 112-14, 148-49, 151-53.

When C.R.S. § 18-9-122(3) became law, Petitioners stopped or altered their activities out of fear of prosecution. Petitioner Simpson completely discontinued his activities on public property within 100 feet of abortion facility entrances. R. 153. Petitioners Hill and Himmelmann changed the ways

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2. The text of the Act is set out in the Petition at 2-3.

in which they carry out their activities. R. 114, 149. These changes have made their counseling, education and protest efforts risky, difficult, and less effective. Petitioners have found it impossible, at times, to remain on the sidewalk, and keep at least eight feet away from others in order to continue speaking, displaying signs or otherwise protesting or counseling. R. 113, 149, 153. Petitioners want to resume their former activities but fear prosecution should they do so. R. 114, 150, 154.

B. *Statement on Preservation of Federal Questions in Trial Court and the Colorado Court of Appeals*

From the outset of this litigation, the federal questions presented in this Petition have been the central focus of the dispute between the parties and the principal grounds of the decisions below.

Petitioners filed a Verified Complaint in the District Court of Jefferson County, Colorado. Therein, Petitioners asserted that C.R.S. § 18-9-122(3) violated several federal constitutional rights. In the Complaint, Petitioners alleged that C.R.S. § 18-9-122(3) violated: the right to freedom of speech under the United States Constitution (Fifth Cause of Action); the right to freedom of the press under the United States Constitution (Sixth Cause of Action); the right to peaceably assemble under the United States Constitution (Seventh Cause of Action); the right to due process under the United States Constitution (Eighth Cause of Action); and, the right to the equal protection of the laws under the United

States Constitution (Ninth Cause of Action).[3] *See* Verified Complaint ¶¶ 1, 5(b), 5(d), 56-64, 65-68, 69-73, 74-77, 78-79, *Hill v. Thomas*, No. 93CV1984 (Jefferson County District Court, Colo.).

The Questions Presented in this Petition are fully preserved for review by this Court.

1. The trial court's treatment of the federal questions.

In an Order dated April 22, 1994, the trial court granted summary judgment for the Respondents. App. 10a-18a. Explaining the nature of the matter, the trial court stated:

> The Plaintiff's [sic] challenge C.R.S. Section 18-9-122 as (1) a violation of freedom of speech under the United States Constitution; (2) a violation of the freedom of press under the United States Constitution; (3) a violation of right of peaceable assembly under the United States Constitution; (4) a violation of the due process clause of the United States Constitution; (5) a violation of the equal protection clause of the United States Constitution; and violative of applicable provisions of the Colorado State Constitution.

App. at 11a. After identifying Petitioners' suit as a facial challenge to the constitutionality of C.R.S. § 18-9-122(3), the trial court noted,

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3. Consistent with their claims that C.R.S. § 18-9-122(3) violated their federal constitutional rights, Petitioners requested a declaration that the Colorado Bubble Zone Statute violated those federal constitutional rights. *See* Prayer for Relief ¶ (a) in the Verified Complaint. *Hill v. Thomas*, No. 93CV1984 (Jefferson County Dist. Ct. Oct. 1, 1993).

> *It is clear, and the parties agree, that the statute in question regulates activity protected by the First Amendment.* The issue before the Court is whether the statute reasonably regulates the activity within the limits proscribed [sic] by the Constitution.

App. at 11a-12a (emphasis added).

Proceeding to the question "whether the statute reasonably regulates" activities protected by the First Amendment, the trial court considered the operative context of the statute. Of Petitioners' expressive activities, the trial court held, "[t]here is no question that the Plaintiff's conduct implicates First Amendment rights." App. at 12a. Further, the court held, "[t]he public sidewalks and streets, including the ones that the statute would apply, [sic] constitute 'quintessential' public forum [sic] for First Amendment purposes." App. at 12a (discussing *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983)).

Having found that protected activities were implicated by a statute that operated in traditional public forum properties, the trial court addressed the specific defects alleged by the Petitioners.

Petitioners alleged that C.R.S. § 18-9-122(3) regulated speech according to its content and or viewpoint. The trial court rejected Petitioners' argument. The court concluded that, because C.R.S. § 18-9-122(3) "applies not only to oral protest but to 'education' and 'counseling[,]'" the statute "applies to all viewpoints, rather then [sic] only certain viewpoints." App. at 13a. The trial court reasoned that the "statute in question applies even-handedly to all speakers and the content of their speech." *Id.* The court also found significant that "[a]ll persons demonstrating are to comply

with the statute." *Id.* Thus, in the court's judgment, the "statute does not govern the subject matter of the message." *Id.*

Petitioners had argued that C.R.S. § 18-9-122(3) was not narrowly tailored. The trial court disagreed. In the trial court's view, the statute "targets the offensive and disturbing conduct taking place outside health care facilities[,]" and "[i]t address[es] the exact source of evil it seeks to remedy." App. at 14a.

Petitioners had argued that C.R.S. § 18-9-122(3) did not leave open ample alternative channels of communication. The trial court held that it did. The court concluded that because the statute only operates within one hundred feet of the entrances to medical facilities and within eight feet of another person, "Plaintiff's [sic] message can still reach its intended audience." App. at 14a.

Petitioners had argued that C.R.S. § 18-9-122(3) is unconstitutionally overbroad. The trial court rejected that argument. The court considered the question of overbreadth according to the standard formulated in *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). App. at 15a. The trial court reasoned

> for the Court to invalidate the statute there must be a substantial overreach of the statute. '[P]articularly where conduct and *or* [sic] *merely speech* is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' The statute must be so sweeping in its scope as to deter both protected and unprotected speech. The overbreadth doctrine has been

> applied to certain statute [sic] that prohibit certain types of unprotected speech, but may also apply to protected speech. This is applied to ensure that the statute does not censure protected speech.

App. at 15a (citations omitted; emphasis added).[4]

Although C.R.S. § 18-9-122(3) prohibits any person from "knowlingly approach[ing] another person . . . for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling," the trial court held that "the statute does not prohibit speech." App. at 15a.

Petitioners argued that C.R.S. § 18-9-122(3) was unconstitutionally vague. The trial court held that the statute "uses common ordinary terms[,]" terms with which "people of ordinary intelligence would be familiar." App. at 16a.

Petitioners alleged that C.R.S. § 18-9-122(3) constituted an

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4. The District Court plainly misread and misunderstood this Court's explanation of the overbreadth doctrine. This fact is evident from its *mis*quotation of *Broadrick v. Oklahoma*. In *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973), this Court addressed the difference between regulations that target *conduct* (while having some indirect effect on expression) and regulations that target *expression*. Enactments of the former type are reviewed under this Court's substantial overbreadth analysis. Of statutes that affect or restrict conduct, this Court actually said, "particularly where conduct and *not merely speech* is involved, we believe that the overbreadth of a statute must not only be real, but subtantial as well, judged in relation to the statute's plainly legitimate sweep." (Emphasis added). The District Court, both in its misquotation and its treatment of Plaintiffs' fundamental rights of expression, purported to subject C.R.S. § 18-9-122(3) to substantial overbreadth analysis, because Petitioners' conduct constituted, "merely speech." That approach puts the First Amendment on its head.

unconstitutional system of prior restraints on protected expression. The trial court disagreed. The court reasoned,

> Prior restraints deal with situations where the legislature or other government entities attempt to restrain or forbid certain communications in advance of the time in which they are to occur.

App. at 17a. Even though C.R.S. § 18-9-122(3) prohibits the distribution of leaflets, the display of signs, and oral protests, counseling or education, within eight feet of another person and one hundred feet of the entrance to a medical facility, and subjects the right to engage in these activities to the requirement that the speaker obtain "consent," the trial court concluded, "[t]his statute requires no license or permit scheme prior to speaking. It does not forbid the Plaintiff's [sic] activities." App. at 17a.

Having rejected every federal constitutional law argument made by Petitioners, the trial court granted the Respondents' summary judgment motion and entered judgment for Respondents.

2. The Colorado Court of Appeals' treatment of the federal questions

Petitioners appealed to the Colorado Court of Appeals. In a decision dated July 13, 1995, the Court of Appeals affirmed. App. at 1a-9a.

Taking up the issues presented, the appeals court first stated, "[t]he principal issue in this appeal is whether § 18-9-122(3), C.R.S. (1994 Cum. Supp.) violates the right to free speech contained in the First Amendment to the United States Constitution." App. at 2a. As in the trial court,

Petitioners relied on principles of federal constitutional and civil rights law, reiterating the substantial constitutional defects that they had identified in their Verified Complaint and in legal arguments in the trial court.

The appeals court concluded that C.R.S. § 18-9-122(3) is a content-neutral regulation of speech. App. at 5a-6a. To buttress its determination, the appeals court invoked this Court's decision in *Madsen v. Women's Health Center*, 512 U.S. ___, 114 S. Ct. 2516 (1994), "as instructive . . . ." App. at 6a. The appeals court reasoned that because C.R.S. § 18-9-122(3) did "not address only the speech of anti-abortion protestors," App. at 6a, and "would also apply to protest activity directed at patients requiring or seeking advice relative to an organ transplant[,]" *id.*, the statute "is content-neutral . . . ." App. at 6a.

Having concluded that C.R.S. § 18-9-122(3) was content-neutral, the appeals court considered whether C.R.S. § 18-9-122(3) passed muster as a "reasonable restriction[] on the time, place, or manner of speech," including whether C.R.S. § 18-9-122(3) was "'narrowly tailored,'" and left open "'ample alternative channels' for communication . . . ." App. at 6a-7a. The appeals court found that C.R.S. § 18-9-122(3) was "narrowly tailored," that is, "reasonably necessary to serve a significant government interest." App. at 7a. The interest identified by the court was the State's interest in ensuring "safety and unobstructed access for patients and staff entering and departing from health care facilities." App. at 7a. Further, the appeals court reasoned that ample alternative channels of communication remained open because "posters and signs may be made visible at eight feet[,]" and because "speech can continue at a distance of eight feet or more."

App. at 7a.

The appeals court rejected Petitioners' argument that C.R.S. § 18-9-122(3) was unconstitutionally vague. The appeals court construed the term "protest" to refer to "written or oral communication advocating a viewpoint on medical treatment and procedures." App. at 8a. The court construed "consent" to mean "oral communication or unmistakable physical conduct manifesting agreement." *Id.* Also, the appeals court construed "counseling and education" as meaning "efforts to present information or guidance to persons entering or leaving a health care facility." *Id.*

Finally, the appeals court rejected Petitioners' argument that C.R.S. § 18-9-122(3) imposed an unconstitutional system of prior restraints on speech. App. at 8a. Petitioners had argued that C.R.S. § 18-9-122(3) created a system of prior restraints because it subjected the rights to freedom of speech, of press, and of assembly, in traditional public forum properties, to the requirement of obtaining advance consent from private persons whom Petitioners approach in public places. Petitioners had argued that the prior restraint scheme was defective because it conveyed unbridled discretion to those empowered to deny the right to free speech, because no time limit was imposed on the decision-making process, and because the system of restraints omitted all of the procedural safeguards necessary to validate an otherwise presumptively unconstitutional scheme. The appeals court rejected Petitioners' prior restraint argument out-of-hand because C.R.S. § 18-9-122(3) did not involve "a governmental or other entity that has authority to permit or not permit certain activities in a public forum." App. at 9a.

The appeals court did not treat two of Petitioners' arguments.

First, Petitioners had argued that, in addition to the danger that C.R.S. § 18-9-122(3) created a content-based restriction on free speech in traditional public forum properties, the restriction on "oral protest" and the requirement of consent ran afoul of the First Amendment's condemnation of viewpoint-based restrictions. Petitioners had argued that C.R.S. § 18-9-122(3) treats certain kinds of oral advocacy differently (subjecting it to the requirement of consent) if it constitutes "protest." Other oral advocacy, Petitioners had argued, such as public speeches defending persons, procedures or policies, are not considered "protest" and could be given voice without permission. The appeals court did not answer Petitioners' argument on this point. Petitioners had also argued that, because the statute imposed a consent requirement but included no standards to govern the decision-making process of private citizens to allow or refuse requests for permission to speak in a traditional public forum, the danger of viewpoint-based denials was real and substantial. The appeals court did not answer Petitioners' argument on that point.

Second, Petitioners had argued that C.R.S. § 18-9-122(3) was unconstitutionally overbroad because it directly targetted the right to freedom of speech and freedom of the press. The appeals court did not answer Petitioners' argument.

Petitioners' request for rehearing was denied. App. at 20a.

Review of a decision of the Colorado Appeals Court by the Supreme Court of Colorado rests in that court's discretion and is sought by the filing of a petition for a writ of certiorari. Petitioners timely filed their petition for a writ of

certiorari in the Colorado Supreme Court. The Colorado Supreme Court denied that petition on February 26, 1996. App. at 19a. The decision of the Colorado Court of Appeals was, therefore, the decision of a state court of last resort in these circumstances.

REASONS FOR GRANTING THE WRIT

The Petition for a Writ of Certiorari presents substantial questions of federal law. Three considerations support the grant of a writ here.

First, the decision below conflicts with the decisions of this Court. This Court struck down a restriction on speech which imposed a requirement of obtaining the consent of private persons for the exercise of that right. *Madsen v. Women's Health Center, Inc.*, 512 U.S. ___, 114 S. Ct. 2516 (1994). The Colorado Court of Appeals ignored this Court's holding and upheld the challenged statute with its "requirement of consent." Further, this Court has held that a content-based restriction on speech in a traditional public forum is subject to strict scrutiny. *E.g.*, *Boos v. Barry*, 485 U.S. 312, 321 (1988). But the Colorado Court of Appeals did not subject the challenged statute to strict scrutiny. The appeals court's selection of the more forgiving "reasonable time, place and manner" standard of review led to the erroneous validation of Colorado's speech-restrictive statute. Moreover, the appeals court's refusal to consider the prior restraint issues led it to affirm the constitutionality of a statute that plainly violates the standards this Court has held applicable to any system of prior restraints on free expression in public places.

Second, the judgment below conflicts with a decision of the United States Court of Appeals for the Eighth Circuit striking down a similar provision of Nebraska law, which restricted free expression in circumstances where consent to speak was withheld or denied. *United Food and Commercial Workers Int'l Union v. IBP*, 857 F.2d 422 (8th Cir. 1988). The judgment below also conflicts with a decision of the North Dakota Supreme Court striking down an injunctive ban on speaking to, or handing a leaflet to, staff and patients of a clinic if they indicate that they do not wish to be spoken to or given a leaflet. *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401, 411 (N.D. 1992).

Third, this Court should grant this petition so that it may resolve the dubious constitutionality of "consent to speak" requirements that operate in traditional public forum properties to restrict paradigm free speech and free press activities. The rise of this heretofore unimaginable burdening of protected expression threatens the enjoyment and longevity of a liberty envied around the globe. This Court has the opportunity in *Schenck v. Pro-Choice Network of Western New York*, No. 95-1065,[5] to affirm *Madsen*'s rejection of *injunctive* schemes that deputize private citizens to act as censors in the public forum. This Petition affords this Court the opportunity to dispose of *legislative* schemes that deputize such pernicious, private anti-speech posses.

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5. The Questions Presented in this Petition raise issues similar to those presented in a Petition recently granted by this Court. *See Pro-Choice Network of Western New York v. Project Rescue-Western New York*, 67 F.3d 377 (2d Cir. 1995) (*en banc*), *cert. granted sub nom. Schenck v. Pro-Choice Network of Western New York*, 64 U.S.L.W. 3623 (U.S. Mar. 15, 1996) (No. 95-1065).

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

A. The Decision Below Conflicts with this Court's Decision in *Madsen v. Women's Health Center, Inc.*

1. The Consent Requirement

In *Madsen v. Women's Health Center, Inc.*, 512 U.S. ___, 114 S. Ct. 2516 (1994), this Court struck down a substantially similar injunctive restriction on speech outside a Florida abortion business. The *Madsen* injunction ordered protestors to "refrain from physically approaching any person seeking services of the clinic 'unless such person indicates a desire to communicate' in an area within 300 feet of the clinic." 114 S. Ct. at 2529.

The bubble zone created by the trial court and rejected by this Court in *Madsen* was overbroad: "it is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.* (emphasis in original). Unless such restrictions are limited to speech that either is "independently proscribable," such as "'fighting words' or threats," "or is so infused with violence as to be indistinguishable from a threat of physical harm," such "provision[s] cannot stand." *Id.*

In the trial court and in the Colorado Court of Appeals, Petitioners had argued that, like the injunctive "bubble zone" in *Madsen*, C.R.S. § 18-9-122(3) was not limited to proscribable speech but instead restricted peaceful, nonthreatening "oral protest," "education," "counseling," sign displays and leafletting. Petitioners argued further that

C.R.S. § 18-9-122(3) does not target precisely the evil it seeks to remedy; the statute regulates *all* attempts to communicate with *any* person in those public places within the scope of the statute. The statute does not regulate *only* contact between speakers and the patients and the employees of medical facilities (though this still would be overbroad). Instead, anyone who is walking down a public street, within 100 feet of the entrance door to a medical facility, is given the power to control whether others may speak, leaflet, or display signs. Petitioners relied on this Court's decision in *Madsen* below, but the appeals court did not find *Madsen*'s disposal of the injunctive consent to speak requirement dispositive. App. at 6a.

In *Madsen*, this Court held, "'that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.'" 114 S. Ct. at 2529 (citation omitted). In words that plainly disposed of such motile personal "bubble zone" restrictions on speech, this Court declared: "The 'consent' requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic." *Id.*

The Colorado Court of Appeals, however, did not find any constitutional infirmity in C.R.S. § 18-9-122(3), even though it "burdens more speech than is necessary to prevent intimidation and to ensure access" to medical facilities in Colorado. The decision of the Colorado Court of Appeals directly conflicts with the holding of this Court in *Madsen* rejecting the creation and enforcement of a motile personal "bubble zone" operating to restrict speech in a traditional public forum.

2. Overbreadth

Implicitly, in *Madsen*, this Court struck down the injunctive "bubble zone" because of its overbreadth. This Court said that the injunctive zone was unconstitutional because it restricted "*all* uninvited approaches . . . regardless of how peaceful the contact may be," 114 S. Ct. at 2529, and it "burden[ed] more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.* The Colorado Court of Appeals, however, found that C.R.S. § 18-9-122(3) was not overbroad, even though it had the benefit of this Court's reasoning in *Madsen* and even though the speech-restrictive zones created by C.R.S. § 18-9-122(3) are functionally similar to the injunctive zone struck down in *Madsen*.

B. The Decision Below Conflicts with this Court's Decisions Regarding the Standard of Review for Content-based Restrictions on Speech.

This Court has held that content-based legislative restrictions on speech in traditional public fora are subject to the strictest scrutiny. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2516-17 (1995); *Capitol Square Review and Advisory Board v. Pinette*, 115 S. Ct. 2440, 2446 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-85 (1992); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 115-18 (1991); *United States v. Eichman*, 496 U.S. 310, 317-18 (1990); *Boos v. Barry*, 485 U.S. 312, 321 (1988); *Texas v. Johnson*, 491 U.S. 397, 411-12 (1987); *Carey v. Brown*, 447 U.S. 455, 460-63 (1980). Such enactments are content-based when they embody direct restrictions on the content of speech or when

they are crafted to allow restrictions on speech to be levied because of audience reactions to speech.

Petitioners argued below that the appropriate standard of review to be applied to C.R.S. § 18-9-122(3) was the strict scrutiny this Court has applied routinely in cases of content-based governmental regulations of speech. Petitioners' argument reflects their textual reading of C.R.S. § 18-9-122(3). The statute distinguishes and burdens certain classes of oral utterance (restricting oral protest, oral education, and oral counseling, and leaving unaffected other oral utterances outside of these classes of communication). In the first instance, the question of whether consent will be required in order to make utterance, the content of the contemplated communication must be considered. If the words are not protest, education, or counseling, no consent is needed. C.R.S. § 18-9-122(3) clearly targets only speech and expressive conduct, and its restrictions are plainly hinged on the content of speech.

The Colorado Court of Appeals rejected both Petitioners' claim that C.R.S. § 18-9-122(3) is content-based and Petitioners' argument that the strict scrutiny standard was the applicable lens for review of the statute. App. at 5a-6a. Instead, the court below analyzed C.R.S. § 18-9-122(3) under the more lenient standard of review for content-neutral regulations of time, place, or manner of expression. App. at 6a-7a.

The choice of standards by the Colorado Court of Appeals and the trial court directly conflict with this Court's decisions in, *inter alia*, *Rosenberger*, *Capitol Square Review and Advisory Board*, *R.A.V.*, *Forsyth County, Ga.*, *Simon &*

Schuster, Inc., *Eichman*, *Boos*, *Texas v. Johnson*, and *Carey*.

C. The Decision Below Conflicts with this Court's Decisions on Prior Restraints of Speech.

Petitioners argued below that the statutory obligation to obtain permission from other citizens in public places before being permitted to display a sign, pass a leaflet, or engage in oral protest, education or counseling, was a prior restraint on free expression. Petitioners argued that, as a prior restraint, C.R.S. § 18-9-122(3) failed constitutional scrutiny because it conveyed unbridled discretion to those from whom a speaker was required to obtain consent to speak, because it imposed no time limits on the decision-maker, and because none of the familiar, constitutional safeguards required by the Constitution in a system of prior restraint are contained in C.R.S. § 18-9-122(3).

1. Unbridled discretion

The Colorado Court of Appeals simply ignored the general rule, observed in this Court, that "speakers need not obtain a license to speak." *Riley v. National Federation of the Blind*, 487 U.S. 781, 802 (1988). Regarding prior restraints, this Court has said,

> a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.

Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51

(1969).[6]

The right to freedom of speech is so important, this Court has said, that

> a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.

Id. at 151.

Petitioners urged the courts below to declare C.R.S. § 18-9-122(3) unconstitutional on the basis of its complete lack of standards to guide those empowered by the statute to grant or withhold permission to speak in public. Nothing in the Colorado Bubble Zone Statute compels the public to grant consent when speech is unobstructive or nonthreatening. No provision of the law prevents the public from withholding consent to speak based on the content or viewpoint of the proposed communication. The spectre of such censorship inevitably induces *self*-censorship in speakers who seek to communicate in traditional public forum properties. *Lakewood*, 486 U.S. at 757.

The court of appeals and the trial court rejected Petitioners' argument regarding the unbridled discretion conveyed under

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6. The problem of unbridled discretion in a scheme of prior restraints has been unambiguously expounded in an extended line of this Court's decisions. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Saia v. New York*, 334 U.S. 558 (1948); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Shuttlesworth*; *Secretary of State of Md. v. Jos. H. Munson Co.*, 467 U.S. 947 (1984).

the statute. The lower courts concluded that because the permission required by the statute had to be obtained from private parties, rather than government officials, the statute was not a prior restraint on expression. App. at 9a, 17a.

2. No time limits for decision-making

To utter oral protests, educational information or words of counsel, to give away free pamphlets, or to show picket signs, Petitioners must first get permission from private citizens. C.R.S. § 18-9-122(3) does not, however, set any limit on the time within which private citizens must act on requests for permission.

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), this Court reiterated the rule that "the failure to place limitations on the time within which a censorship board decisionmaker must make a determination . . . is a species of unbridled discretion." *Id.* at 223 (citing *Freedman v. Maryland*, 380 U.S. 51 (1965)). In *Riley*, this Court struck down a speech licensing scheme that failed to impose definite time limitations on licensors. The lack of a time limitation was unconstitutional because, under North Carolina's charitable solicitations statute, in those circumstances "delay compel[led] silence." *Riley*, 487 U.S. at 802. Here, as in *Riley*, delay in responding to an application for permission to speak compels silence.

The courts below affirmed the constitutionality of C.R.S. § 18-9-122(3) even though the statute contains no time limitation. App. at 9a, 17a.

3. No procedural safeguards

Petitioners argued below that C.R.S. § 18-9-122(3) was an *unconstitutional* prior restraint because the statute provided none of the procedural safeguards that this Court has identified as essential in a system of prior restraints on speech to avoid facial constitutional invalidation. In *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965), this Court identified three procedural safeguards necessary to "obviate the dangers of a censorship system." 380 U.S. at 58. Those safeguards included burdening the censor with proving that the suppressed film was unprotected, *id.*, requiring the censor to obtain a judicial determination of whether the suppressed film constituted protected expression, *id.*, and limiting the denial of a license to "the shortest fixed period compatible with sound judicial resolution." *Id.* at 59.

None of these safeguards are provided in Colorado's Bubble Zone statute, C.R.S. § 18-9-122(3). The decisions below exalted form over substance; the lower courts rejected Petitioners' prior restraint arguments on the ground that C.R.S. § 18-9-122(3) delegates decision-making authority to *private* censors rather than *government* officers, which *supposedly* differentiated it from prior restraint schemes held unconstitutional in the decisions of this Court. App. at 9a, 17a.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF A FEDERAL CIRCUIT COURT AND A STATE COURT OF LAST RESORT.

A. Conflict with the United States Court of Appeals for the Eighth Circuit

The Colorado Court of Appeals' decision directly conflicts with the decision of the United States Court of Appeals in *United Food and Commercial Worker's Int'l Union v. IBP*, 857 F.2d 422 (8th Cir. 1988). In *IBP*, the Eighth Circuit affirmed a district court decision holding unconstitutional a Nebraska statute that provided,

> [a] person commits the offense of unlawful picketing if . . . he interferes, or attempts to interfere, with any other person in the exercise of his or her lawful right to work . . . by . . . persisting in talking to or communicating in any manner with such person or members of his or her immediate family against his, her or their will, for such purpose.

Neb. Rev. Stat. § 28-1317(1)(a) (1985) (quoted at 857 F.2d at 426). The Nebraska statute operated on a presumption that unwelcome words are unprotected words. The Eighth Circuit, relying on this Court's decisions, rebuffed that concept: "[t]hat the speech is unwelcome does not deprive it of protection." 857 F.2d at 432 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Cohen v. California*, 403 U.S. 15 (1971); and, *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971)).

Under the stricken Nebraska statute no consent to speak was required before communications were initiated, *see* Neb.

Rev. Stat. § 28-1317(1)(a) (1985). But C.R.S. § 18-9-122(3) does not even contain that extremely minimal limitation: the statute prohibits not only persistence of communication, but also initiation of communications without consent.

The decision of the Colorado Court of Appeals, sustaining the constitutionality of Colorado's Bubble Zone Statute, cannot be reconciled with the judgment of the United States Court of Appeals in *IBP*.[7]

B. Conflict with the Supreme Court of North Dakota

The decision of the Colorado Court of Appeals directly conflicts with the North Dakota Supreme Court's decision in *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401, 411 (N.D. 1992).

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7. The decision below — affirming the constitutionality of a statute that "makes a crime out of what under the Constitution cannot be a crime" and that is "aimed directly at activity protected by the Constitution," *Coates v. Cincinnati*, 402 U.S. 611, 616 (1971) — is also inconsistent with, if not in direct conflict with, the decision of the United States Court of Appeals for the Fourth Circuit in *N.O.W. v. O.R.*, 914 F.2d 582 (4th Cir. 1990) (per curiam), *rev'd in part on other grounds sub nom. Bray v. Alexandria Women's Health Center*, 506 U.S. 263 (1993). In *N.O.W.*, the Fourth Circuit *affirmed* a district court's order refusing to "broaden the scope" of an injunction

> to include activities that tend to 'intimidate, harass or disturb patients or potential patients' because to do so would risk enjoining activities clearly protected by the First Amendment. In addition to the actions enjoined by the district court, the members of Operation Rescue also sought, through verbal means, to persuade women not to seek the services of abortion clinics and to 'impress upon members of society' the moral rightness and intensity of their opposition to abortion. . . . The district court was within its discretion in declining to extend the injunction in a manner that would interfere with such expressive activity.

914 F.2d at 586 (citation omitted).

In *Lambs of Christ*, the North Dakota Supreme Court struck down the provision of an injunction that prohibited "'speaking to staff and patients . . . who indicate that they do not wish to be spoken to'" and "'distributing leaflets or brochures to any person who has indicated orally or by gesture that such person does not wish to receive such literature.'" 488 N.W.2d at 407 n.1 (setting out provisions of injunction). Regarding the prohibitions, on speaking and on distributing literature after a person communicates their wish not to receive it, the North Dakota Supreme Court held that "'speaking' to staff and patients cannot be constitutionally enjoined," 488 N.W.2d at 411, and that "distributing literature is protected communicative activity" for which a complete ban would be inappropriate under the First Amendment. *Id.*

In Colorado, however, "speaking" *to anyone* who does not consent to be spoken to subjects a person to criminal prosecution, at least when such "speech" constitutes "oral protest, education or counseling" under the circumstances set forth in C.R.S. § 18-9-122(3). Yet the Colorado Court of Appeals upheld the Colorado Bubble Zone law.

The decision below cannot be reconciled with the decision of the North Dakota Supreme Court in *Lambs of Christ*.

III. THE PETITION PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT THIS COURT SHOULD RESOLVE.

This Petition invites this Court to consider the constitutionality of a state statute that subjects the rights of free speech, free press and peaceable assembly to a requirement that consent be obtained from members of the

public before the speech can occur.

C.R.S. § 18-9-122(3) directly restricts activities entitled to substantial constitutional protection. C.R.S. § 18-9-122(3), while purporting to serve the State's interest in securing access to medical facilities, does not regulate obstructive activities, trespass, assaults or the use of threatening language. Instead, the statute is crafted in a way that reveals the State's true interest: suppressing free speech. C.R.S. § 18-9-122(3) prohibits leafletting, display of a picket sign displays, and oral protest, counseling and education, without a close fit between such expressive activities and the asserted interest of Colorado in insuring free access to medical facilities.

Colorado has codified a principle—audience veto power—which other communities might well wish to duplicate. For example, in Skokie, Illinois, there can be little doubt that, had the residents of the Village of Skokie been the final arbiters, uniformed neo-Nazis could not have marched down that Village's streets. *Cf. National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). And, in Cummings, Georgia, if those city residents who lined the street to protest against it had been deputized to decide the question, that city would never have played host to the largest civil rights demonstration in the South since the 1960s. *Cf. Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992).

Colorado is not alone in its use of speech-free "bubble zone" to restrict freedom of speech in the public forum. Since Colorado's enactment of C.R.S. § 18-9-122(3), the City of Phoenix, Arizona, has enacted a similar provision under its city ordinances. *See* Petition for Writ of Certiorari at 3-4,

Sabelko v. City of Phoenix, No. 95-1415 (U.S. filed Mar. 3, 1996). The City of Santa Barbara, California, has also adopted a similar restriction. *See Edwards v. City of Santa Barbara*, 883 F. Supp. 1379 (C.D.Cal.), *vacated and remanded*, 70 F.3d 1277 (9th Cir. 1995). These legislative enactments all disregard this Court's direct holding in *Madsen* on the use of such "requirement of consent" provisions.

This Court has granted certiorari in *Schenck v. Pro-Choice Network of Western New York*, 64 U.S.L.W. 3623 (U.S. Mar. 15, 1996) (No. 95-1065). In *Schenck*, the *en banc* Second Circuit upheld a provision in a preliminary injunction that subjected pro-life "sidewalk counselors" to the restriction that, if the person to whom they were speaking indicated that they did not wish to receive the information being offered to them, the counselors must "cease and desist" in their effort to communicate. *See* No. 95-1065, Pet. App. A-13. C.R.S. § 18-9-122(3) goes even further than the injunctive provision in *Schenck*; unless one has first obtained consent to speak, to show a sign, or to pass a leaflet, these paradigmatic forms of expression constitute criminal violations.

To be sure, in communities across the Nation, veterans' organizations will still conduct Fourth of July festivities, department stores will continue unabated in the promotion of Thanksgiving Day Parades, and Hibernians, with occasional judicial interlude, will continue to sponsor St. Patrick's Day events. But if C.R.S. § 18-9-122(3) stands and continues to serve as a model for legislative enshrinement of the audience veto, then the consequence will be incalculable injury to the rights of freedom of speech, freedom of the press, and freedom of assembly. The decision below, accepting and affirming government enforcement of private

citizens' rights to veto expressive activities in public places, is inconsistent with the First and Fourteenth Amendments.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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May 24, 1996.

APPENDIX

Colorado Court of Appeals July 13, 1995
No. 94CA0856

Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr., Plaintiffs-Appellants,

v.

City of Lakewood, Colorado; Gale A. Norton, in her official capacity as Attorney General of the State of Colorado; and the State of Colorado, Roy Romer, Governor, Defendants-Appellees.

Appeal from the District Court of Jefferson County
Honorable Gaspar F. Perricone, Judge.
No. 93CV1984.

Division V JUDGMENT AFFIRMED
Opinion by JUDGE RULAND
Sternberg, C.J., and Rothenberg, J., concur

The American Center for Law & Justice, Jay Alan Sekulow, James Matthew Henderson, Sr., Washington, DC; Roger W. Westlund, Thornton, for plaintiffs- appellants.

Gorsuch Kirgis L.L.C., Roger W. Noonan, Maureen Herr Juran, Denver, for defendant-appellee City of Lakewood, Colorado.

Gale A. Norton, Atty. Gen., Stephen K. ErkenBrack, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., Carol D. Angel, Sr. Asst. Atty. Gen., Kathie A. Greenwalt Troudt, Asst. Atty. Gen., Denver, for defendants-appellees Gale A. Norton and State of Colo., Roy Romer, Governor.

Fairfield and Woods, P.C., Howard Holme, Denver; Legal

Action for Reproductive Action, Celeste Lacy Davis, Roger K. Evans, New York City, for amicus curiae Planned Parenthood of the Rocky Mountains.

Joseph N. de Raismes, III, City Atty., Boulder, for amicus curiae City of Boulder.

The principal issue in this appeal is whether s 18-9-122(3), C.R.S. (1994 Cum.Supp.) violates the right of free speech contained in the First Amendment to the United States Constitution. Plaintiffs, Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr., appeal from a summary judgment determining that the statute does not violate the First Amendment. We affirm.

Section 18-9-122, C.R.S. (1994 Cum.Supp.), enacted in 1993, provides:

> (1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.
>
> ....
>
> (3) No person shall knowingly approach another person

within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

Prior to this statute's adoption, hearings were conducted before the House and Senate Judiciary Committees of the General Assembly. In one of the hearings before the House Committee, testimony was presented concerning the conduct of some antiabortion protesters at various medical clinics directed both at patients and staff. See Tape Recording of Testimony before House Judiciary Committee concerning H.B. 1209 (February 12 & 16, 1993, 59th General Assembly). This conduct included efforts to block access to the clinics and to intimidate and harass patients and staff in various ways. The committees were also informed, however, that out of 60,000 patients who obtained services at one of the clinics, only seven percent were there to consider abortions. Nevertheless, all patients were subjected to the same treatment by the protesters. See Tape Recording of Testimony before Senate Judiciary Committee concerning H.B. 1209 (March 3, 1993, 59th General Assembly).

The committees also heard testimony that other types of protests such as those made by animal rights activists occur at medical clinics in the United States where the transplant of animal organs is performed or assessed. The witness also indicated that protesters create a particularly difficult situation for persons with physical disabilities who lack the physical capability to move through crowds. See Tape

Recording of Testimony before House Judiciary Committee concerning H.B. 1209 (February 12 & 16, 1993, 59th General Assembly).

Following passage of the statute, plaintiffs filed this action seeking a declaratory judgment that s 18-9-122(3), C.R.S. (1994 Cum.Supp.) violates the First Amendment on its face and that a permanent injunction should enter against enforcement of the statute by defendants, David J. Thomas (as District Attorney), the City of Lakewood, Gale A. Norton (as Attorney General), and the State of Colorado.

In their complaint and affidavits filed relative to the summary judgment, plaintiffs state that they are "sidewalk counselors" who offer abortion-bound women alternatives to that medical procedure. Plaintiffs state that they educate, counsel, persuade, or inform pedestrians and occupants of motor vehicles in areas adjacent to medical clinics about abortion and abortion alternatives.

To assist in this effort, plaintiffs prepare and distribute written material including cards, leaflets, and pamphlets. Plaintiff Hill uses a fetal model in her counseling and displays it to the public. Posters are also used. Plaintiffs claim that it is impossible at times both to remain on the sidewalk and stay at least eight feet away from others in order to continue speaking, displaying signs, or otherwise protesting or counseling.

I

Section 18-9-122(3) incorporates the so-called "bubble" concept designed to allow communication between protesters and others but to separate the protesters by an eight-foot distance. The statute applies to public sidewalks and streets

which are areas protected by the First Amendment. See Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495, 101 L.Ed.2d 420 (1988); Denver Publishing Co. v. City of Aurora, 896 P.2d 306 (Colo.1995).

Plaintiffs contend that the statute is unconstitutional for a number of reasons. First, they argue that the statute is an improper "content based" regulation which is directed only at them and applies to all forms of written and oral communication. Second, they assert that the statute is overbroad because it infringes upon their right of free speech more than necessary to accomplish the goal of providing access to health care facilities. We are not persuaded by either argument.

Initially, we address whether a presumption of constitutionality applies to s 18-9-122(3). As our supreme court held in Denver Publishing Co. v. City of Aurora, supra, if the statute is deemed to be a "content-neutral" statute, plaintiffs must introduce competent evidence that the regulation in fact burdens the exercise of free speech. The burden then shifts to defendants to demonstrate that the statute withstands application of the appropriate constitutional standard of review.

If, on the other hand, the statute is intended to apply only to plaintiffs because of their beliefs and viewpoint regarding abortion, then Denver Publishing Co. v. Aurora, supra, suggests that there may be a presumption against its constitutionality. Cf. People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348 (Colo.1985).

The next issue then is whether the statute is content-neutral, that is, whether the statute is directed only

to anti-abortion protesters and their viewpoint.

In Madsen v. Women's Health Center, Inc., 512 U.S. —, 114 S. Ct. 2516, 129 L.Ed.2d 593 (1994), the United States Supreme Court addressed the provisions of a mandatory injunction issued by a Florida state court against protesters at medical clinics in this context. We view the analysis of the Court as instructive here.

Like the injunction entered in Madsen, s 18-9-122(3) does not address only the speech of anti-abortion protesters. The statute would impose the same restrictions upon protesters demonstrating in favor of abortion. The law would also apply to protest activity directed at patients requiring or seeking advice relative to an organ transplant. Accordingly, applying the analysis of Madsen, we conclude that § 18-9-122(3) is content-neutral because the specific viewpoint of any person who protests at a health care facility is not relevant to a determination whether a violation of the statute has occurred. See American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir.1995) (upholding constitutionality of the Federal Freedom of Access to Clinics Entrances Act).

Given our determination that the statute is content-neutral, Madsen indicates that the constitutionality of § 18-9-122(3) must be analyzed under the criteria stated in Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L.Ed.2d 661 (1989); see also Denver Publishing Co. v. City of Aurora, supra. The Court in Ward confirmed its holding in prior cases that, even on public streets and sidewalks, the government may impose reasonable restrictions on the time, place, or manner of speech. However, those restrictions must be "narrowly tailored," that is, the restrictions must limit free

speech only to the extent reasonably necessary to serve a significant governmental interest. Otherwise, the statute is deemed "overbroad." Finally, it must appear that there are "ample alternative channels" for communication of the information.

We hold that § 18-9-122(3) meets the enumerated constitutional requirements.

First, the statute advances a significant governmental interest, namely, to ensure the safety and unobstructed access for patients and staff entering and departing from health care facilities.

Second, the statute does not burden speech more than is reasonably necessary because plaintiffs may continue to communicate with the patients and staff at a distance of eight feet or more. Indeed, the restriction merely is directed at depriving protesters of the opportunity to intimidate or make other physical contact with the patients or staff.

Finally, in addition to oral communication, posters and signs may be made visible at eight feet with the result that reasonable alternatives to face-to- face communication and direct pamphlet handouts are available. Accordingly, we conclude that the trial court did not err in concluding that defendants satisfied their burden to demonstrate that the statute satisfied the applicable constitutional requirements. Further, to the extent that Edwards v. City of Santa Barbara, 883 F.Supp. 1379 (S.D.Cal. No. 94-2243 RG (JRX), March 14, 1995) is inconsistent with the result we reach here, we decline to follow that case.

II

Plaintiffs next contend that § 18-9-122(3) is unconstitutionally vague. Specifically, they argue that a person of common intelligence will not be able to understand what conduct is prohibited in the context of "knowingly approach." They further contend that the terms "consent," "protest," and "counseling and education" fail to meet constitutional requirements for definiteness. We disagree with all of these contentions.

The term "knowingly" is defined in s 18-1-501(6), C.R.S. (1986 Repl.Vol. 8B) of the Criminal Code. A protester acts knowingly if the protester is aware that his or her conduct will cause the protester to be less than eight feet from someone entering or leaving the health care facility without consent. See People v. Krovarz, 697 P.2d 378 (Colo.1985).

Because the remaining terms are not technical in nature, we must apply the common usage of those words. Section 2-4-101, C.R.S. (1980 Repl.Vol. 1B). To the extent that plaintiffs seek to contrast alternative definitions of the words used, we must apply a common definition that is not vague. See Frisby v. Schultz, supra; City of Englewood v. Hammes, 671 P.2d 947 (Colo.1983).

Thus, as pertinent here, "protest" refers to written or oral communication advocating a viewpoint on medical treatment and procedures. See Webster's Third New International Dictionary 1823. "Consent" refers to oral communication or unmistakable physical conduct manifesting agreement. See Webster's Third New International Dictionary 482. "Counseling and education" refers to efforts to present information or guidance to persons entering or leaving a health care facility.

III

Plaintiffs also contend that s 18-9-122(3) constitutes an unconstitutional prior restraint on speech because the consent of a patient is required before a protester may approach within less than eight feet but no time deadline for the patient's consent is provided. Further, they argue that private citizens have unlimited discretion to determine whether consent will or will not be given without having to apply reasonable guidelines. Finally, they complain that there is no judicial review provided in the statute to determine whether the private citizen's discretion has been exercised in a reasonable fashion. There is no merit in these contentions.

Statutes which have been held unconstitutional as a prior restraint on free speech ordinarily involve a governmental or other entity that has authority to permit or not to permit certain activities in a public forum. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L.Ed.2d 448 (1975). We are not aware of any authority that would extend this doctrine to impose limitations upon the right of a private citizen to determine whether to permit others to confront that individual concerning medical care or treatment.

The judgment is affirmed.

CHIEF JUDGE STERNBERG and JUDGE ROTHENBERG, concur.

DISTRICT COURT, COUNTY OF JEFFERSON,
STATE OF COLORADO
CASE NUMBER 93 CV 1984, DIVISION II - GFP

ORDER

LEILA JEANNE HILL; AUDREY HIMMELMANN; and EVERITT W. SIMPSON, JR.,

Plaintiffs,

-v-

DAVID J. THOMAS, in his official capacity as District Attorney for the First Judicial District of the State of Colorado:, THE CITY OF LAKEWOOD, COLORADO; GALE A. NORTON, in her official capacity as Attorney General for the State of Colorado; and STATE OF COLORADO, Roy Romer, Governor,

Defendants.

This matter comes before the Court on the Defendant's Motion for Summary Judgement. The Court finds that it has jurisdiction over the parties and subject matter of this action, and being fully advised in the premises has dispensed with a hearing on the motion pursuant to C.R.C.P. Rule 121, Section 1-15.

After reviewing the record, the Defendant's Motion, the Plaintiff's Response and the briefs submitted by the parties, the Court finds Pursuant to Rule 56 C.R.C.P., there are no genuine issues of material fact in dispute and that the issues

presented are issues of law.

The Plaintiff's challenge C.R.S. Section 18-9-122 as (1) a violation of freedom of speech under the United States Constitution; (2) a violation of the freedom of press under the United States Constitution; (3) a violation of right of peaceable assembly under the United States Constitution; (4) a violation of the due process clause of the United States Constitution; (5) a violation of the equal protection clause of the United States Constitution; and violative of applicable provisions of the Colorado State Constitution.

"[al statute is presumed constitutional... and 'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" Heller v. Doe, 113 S.Ct 2637, 2643 (1993), See also Parrish v. Lamm, 758 P.2d 1356, 1364 (Colo. 1988).

The Court finds that C.R.S. Section 18-9-122 has not been applied to the Plaintiffs. There is no showing by the Plaintiffs that any of them have been arrested, charged, cited. detained or referred for prosecution for violating any part of C.R.S. Section 18-9-122. See admissions of all Plaintiffs.

Therefore the Plaintiffs have only presented a facial challenge to the statute. Where a statute has not been enforced, the challenge is identified as facial. See High Gear and Toke Shop v. Beacom, 689 P.2d 624 (Colo. 1984). Therefore, the Court must examine on its face to determine whether C.R.S. Section 18-9-122 can be possibility construed as constitutional and avoid strained interpretations. People v. Smith, 862 P.2d 939 (Colo. 1993).

It is clear, and the parties agree, that the statute in question regulates activity protected by the First Amendment. The

issue before the Court is whether the statute reasonably regulates the activity within the limits proscribed by the Constitution.

FREEDOM OF SPEECH

The Plaintiffs engage in "sidewalk counseling." This activity consists of efforts to educate counsel, persuade or inform persons about abortion and alternatives to abortion. This is accomplished through oral expression, protest, displays, signs and leafletting. See affidavits of all Plaintiffs. There is no question that the Plaintiffs conduct implicates First Amendment rights.

However, the First Amendment does not guarantee the right to communicate one's view's at all times and places or in any manner that may be desired." Heffron v. ISKCON, 452 U.S. 640 (1981).

The Plaintiffs engage in these activities on the public streets and public sidewalks. Many times these are located within 100 feet of the entrances to medical facilities. The statute clearly applies to these locations.

The public sidewalks and streets, including the ones that the statute would apply, constitute "quintessential" public forum for First Amendment purposes. See Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37 (1983).

However, the state may subject such expression whether oral or written or symbolized, by conduct to reasonable time, place, and manner restrictions. These regulations will be found reasonable where they "are content-neutral, are narrowly tailored to serve a significant government interest,

and leave open ample alternative channels of communications." Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37 (1983).

A. CONTENT NEUTRAL

The Supreme Court states that "the principal inquiry in determining content neutrality... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 785 (1989).

The Plaintiffs argue that one may be prosecuted under the statute if negative statements are said to people in the vicinity because the statute uses the word "protest." They argue that the statute would not apply to positive statements and therefore positive statements would be permissible. However, the statute applies not only to oral protest but to "education" and "counseling." It appears clear that the statute applies to all viewpoints, rather then only certain viewpoints.

Furthermore, evidence provided by the Defendant's show that the legislative history of the statute makes it clear that the statute applies to all viewpoints rather then certain viewpoints. The state has not favored one view point over another as the Plaintiffs contend.

The Court finds the statute in question applies even-handedly to all speakers and the content of their speech. All persons demonstrating are to comply with the statute. The statute does not govern the subject matter of the message.

B. THE REGULATION MUST BE NARROWLY TAILORED, TO SERVE A SIGNIFICANT GOVERNMENTAL INTEREST.

The statute is designed to protect access to health care facilities. It protects the persons using a health care facility to do so without being threatened, harassed or assaulted by forced confrontations with demonstrators.

The regulation is unrelated to the content of the message. It is related to safeguarding access to health care facilities. This regulation applies equally, not only to pro life or pro choice protestors, but any others engaged in the activities that the statute addresses. Furthermore, even if the regulation has some incidental effect on some speakers and not others the regulation will be deemed neutral. See Ward v. Rock Against Racism, 491 U.S. 781 (1989).

Plaintiffs argue there are other statutes designed to deal with this problem such as assault, trespass, harassment. However, C.R.S. Section 18-9-122 targets the offensive and disturbing conduct taking place outside health care facilities. It address the exact source of evil it seeks to remedy.

The Court finds that the "free zone" is narrowly tailored to address these abuses that impede ingress and egress to medical facilities and the regulation promotes a significant governmental interest that is unrelated to the content of the message.

C. AMPLE ALTERNATIVE MEANS OF COMMUNICATION;

The statutory scheme leaves open ample alternative means of communication. The Plaintiff's message can still reach its intended audience.

The statute only restricts the demonstrators from engaging in their activities within the "free zone " This area constitutes 100 feet of the entrance of a medical facility and within 8 feet

of the listener unless the listener consents. The plaintiffs signs and leaflets may be seen at this distance. Speech may also be heard at this distance.

Although, it may be more difficult for the Plaintiffs to force leaflets in the hands of unwilling recipients and their messages upon audiences unable to escape, the Plaintiff's are able to carry on their activities provided they do so outside the "free zone."

OVERBREADTH CHALLENGE

In order for the Court to invalidate the statute there must be a substantial overreach of the statute. "[P]articularly where conduct and or merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

The statute must be so sweeping in its scope as to deter both protected and unprotected speech. The overbreadth doctrine has bin applied to certain statute that prohibit certain types of unprotected speech, but may also apply to protected speech. This is applied to ensure that the statute does not censure protected speech. Hoffman Estates, 455 U.S. at 594. It is not for the Court to determine how creative the challenging party must be in conceiving situations where the language of the statute might be applied to protected speech.

In this case the statute does not prohibit speech. The statute only imposes reasonable time, place and manner restraints on the First Amendment activity. The statute does provide objective standards and guidelines for permitting or

denying the display of signs, the distribution of literature and/or speaking. All these activities may be engaged in as long as the speakers remain outside the "free zone."

The Court believes the statute will do little to deter protected speech. The Plaintiffs state in their affidavits that they will continue with their protected First Amendment activities. See Affidavits of Plaintiffs.

VAGUENESS CHALLENGE

The law must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104 (1972). In addition the law must provide standards for applying the law. Id. at 109.

The words of the statute are given their commonly accepted and understood meaning. East Lakewood San. Dist. v. District Court, 842 P.2d 233, 235 (Colo. 1992).

The statue uses common ordinary terms. The statute speaks in terms of "oral protest," "counseling," and "education." These are everyday terms in which people of ordinary intelligence would be familiar. The statute also provides exact measurements in which these activities may not take place. This area is known as the "free zone." This zone constitutes the area within 8 feet of a person and the area within 100 feet of a medical care facility.

The Court finds that the statute uses terms that fairly and accurately describe conduct forbidden within the "free zone."

The Court finds the statute gives warning of the prohibited conduct. That the Plaintiffs know how to carry out their activities within the proscribed limits of the statute and know

what is expected of them when they are "sidewalk counseling."

PRIOR RESTRAINTS

The Plaintiffs argue that C.R.S. Section 18-9-122(3), imposes a requirement of prior permission before speaking. They claim that under this regulation the private citizens of the state or at least all private citizens in the vicinity of a health care facility are somehow deputized and transformed into agents of the State. And therefore, these private citizens have the power to prohibit the Plaintiffs from engaging in their activities if these citizens do not consent. The Court finds the Plaintiffs argument unpersuasive.

Prior restraints deal with situations where the legislature or other government entities attempt to restrain or forbid certain communications in advance of the time in which they are to occur. This is usually accomplished through licensing or permit schemes.

All prior restraints have one thing in common; they give "public officials the power to deny use of a forum in advance of actual expression." Southeast Promotions v. Conrad, 420 U.S. 546 (1975).

This statute requires no license or permit scheme prior to speaking. It does not forbid the Plaintiffs activities. Therefore, the prior restraint doctrine has no applicability to this statute.

CONCLUSION

The Court addressed all issues set forth in the motions for Summary Judgment and therefore by direct reference or comments made herein disposes of all issues raised in the

complaint.

It is therefore ordered that the motion for Summary Judgment of the Defendant's be granted, that C.R.S. Section 18-9-122 as amended is facially constitutional, and that the complaint be, and the same is hereby dismissed.

DONE AND SIGNED IN OPEN COURT this 22nd day of April, 1994.

BY THE COURT:

/s/
Gaspar F. Perricone
District Judge

[certificate of mailing omitted]

SUPREME COURT, STATE OF COLORADO
CASE NO. 95SC593
CERTIORARI TO THE COLORADO COURT OF APPEALS, 94CA0856
DISTRICT COURT, JEFFERSON COUNTY, 93CV1984

ORDER OF COURT

LEILA JEANNE HILL; AUDREY HIMMELMANN; and EVERITT W. SIMPSON, JR.,

Petitioners,

v.

DAVID J. THOMAS, in his official capacity as District Attorney for the First Judicial District of the State of Colorado; CITY OF LAKEWOOD, COLORADO; GALE NORTON, in her official capacity as Attorney General of the State of Colorado ; and THE STATE OF COLORADO, ROY ROMER, Governor,

Respondents

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 26, 1996.

[service list omitted] [seal omitted]

THE COURT OF APPEALS OF
THE STATE OF COLORADO

Case Number 94CA0856

ORDER

LEILA J. HILL ET AL V DAVID J. THOMAS ET AL

Upon consideration of the Petition for Rehearing filed by the Appellant herein the Petition is hereby DENIED. It is ordered that issuance of the Mandate is stayed to and including September 18th 1995, provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain if effect until disposition of the cause by the Supreme Court.

BY THE COURT:

Ruland, J.
Sternberg, C.J.
Rothenberg, J.

DATED: August 17, 1995

[service stamp omitted] [seal omitted]

Supreme Court, U.S.
FILED
JUN 21 1996
CLERK

No. 95-1905

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

LEILA JEANNE HILL et al.,
Petitioners,
vs.
THE STATE OF COLORADO,
ROY ROMER, GOVERNOR et al.,
Respondents.

On Petition for Writ of Certiorari to
the Court of Appeals of the State of Colorado

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Was the Colorado Court of Appeals correct in holding that Colo. Rev. Stat. § 18-9-122(3) (1995 Cum. Supp.), which regulates the manner of expressive activities within 100 feet of the entrance of health care facilities, is constitutional as a reasonable time, place or manner regulation of speech?

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No. 95-1905

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

LEILA JEANNE HILL et al.,
Petitioners,
vs.
THE STATE OF COLORADO,
ROY ROMER, GOVERNOR et al.,
Respondents.

On Petition for Writ of Certiorari to
The Court of Appeals of the State of Colorado

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTORY PROVISION

The version of § 18-9-122 reprinted in the petition for writ of certiorari contained a typographical error and was incomplete. In full, Colo. Rev. Stat. § 18-9-122 (1995 Cum. Supp.) provides:

> **18-9-122. Preventing passage to and from a health care facility - engaging in prohibited activities near facility.** (1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or

counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.

(2) A person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility.

(3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

(4) For the purposes of this section, "health care facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.

(5) Nothing in this section shall be construed to prohibit a statutory or home rule city or county or city and county from adopting a law for the control of access to health care facilities that is no less restrictive than the provisions of this section.

(6) In addition to, and not in lieu of, the penalties set forth in this section, a person who violates the provisions of this section shall be subject to civil liability, as provided in section 13-21-106.7, C.R.S.

STATEMENT OF THE CASE

The Colorado General Assembly enacted Colo. Rev. Stat. § 18-9-122 (1995 Cum. Supp.), to protect access to health care, public safety, and privacy, following a history of demonstrations that blocked or impeded access to health care facilities through direct physical blockades, grabbing and shoving patients seeking access, and other intimidating and threatening activities such as surrounding cars and people at close quarters, thrusting posters and leaflets against windows and into faces. R.S.[1] 146-56, 176-78, 181-83, 188-89, 233-38, 241-43. The General Assembly relied in part on experience under very similar city ordinances, passed in Denver in 1990 and in Boulder in 1986, which had

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[1] The Record in this case was in 3 volumes all entitled "Volume I," due to the district court's inadvertent omission and later transmission of some designated documents. This brief will refer to the volume transmitted to the Colorado Court of Appeals on August 5, 1994 as "R. ___;" and to the volume transmitted on October 26, 1994 as "R.S. ___."

successfully operated to protect health care access without interfering with expressive activities. R.S. 144, 155-56, 188-89, 199, 231.

The statute prohibits both physically obstructing access and, in § 18-9-122(3), interfering with access through intimidating "forced proximity"[2] -- forcing leaflets, signs or speech on unwilling listeners at extremely close quarters. The General Assembly acted not out of hostility towards any particular viewpoint, but out of concern about the harmful effects of the aggressive and intimidating physical tactics of some demonstrators. R.S. 189-92, 196-97, 217-18, 222, 230-33, 238-240. The record in this case shows that the "forced proximity" targeted by the statute causes anxiety and fear for personal safety, triggering physiological responses that can increase the risks of medical procedures for patients seeking health care. R. 263-65; R.S. 4, 7-9, 26-30, 36-38, 40-42, 44, 240. The record further shows that a close, unconsented approach by a stranger in public is interpreted as a threat and raises the fear of physical contact. R. 262.

Petitioners several times misstate the operation of the challenged provision, § 18-9-122(3) (hereinafter "the statute"). *See* Pet. at i, 5, 9, 11, 18, 27-28. It does not ban expressive activity within eight feet of any other person, as Petitioners assert. Pet. at i. Rather, within 100 feet of the entrance to a health care facility, it prohibits only: (1) "knowingly approaching" another person more closely than eight feet; (2) without the consent of that other person; (3) for the purpose of oral protest, counseling or education, leafletting, or displaying a sign **to that other person**.

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[2] *See* Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 *Harv. L. Rev.* 1856 (1988). R.S. 301-10.

Petitioners have also given an incomplete report of their experiences with the statute. Petitioners Hill, Himmelmann, and Simpson have all demonstrated outside health care facilities for a number of years. R. 112-13, 148-49, 151-52. Petitioner Hill admitted that since passage of the statute, she has continued sidewalk counseling, leafletting, picketing, and oral protest, education and counseling within 100 feet of health care facilities, albeit "with great caution and circumspection." R.S. 48, 54-55. Petitioner Himmelmann as well admitted that she has continued picketing and oral protest, education and counseling within 100 feet of health care facilities since passage of the statute. R.S. 57, 63-64. In spite of their continuing activities, none of the Petitioners have ever been cited, detained, arrested or referred for prosecution under the Denver or Boulder ordinances or the statute. R.S. 47, 56, 65. Petitioners' only contact with any law enforcement was a letter Petitioner Simpson **requested** from the Lakewood City Attorney's Office, which stated generally that Lakewood police were informed of and prepared to enforce the statute. R.S. 55, 63, 72. Both the trial court and the Colorado Court of Appeals recognized that Petitioners had brought only a facial challenge against the statute. Pet. App. at 4a, 11a.

Petitioners brought this challenge to the statute in Jefferson County District Court, which upheld the statute. Although Petitioners cite extensively to the trial court's opinion, they have omitted the most essential finding, that the statute "protects the persons using a health care facility to do so [sic] **without being threatened, harassed or assaulted by forced confrontations with demonstrators.**" Pet. App. at 14a (emphasis added).

Petitioners have also omitted the key ruling of the Colorado Court of Appeals that:

> [T]he statute does not burden speech more than is reasonably necessary because plaintiffs may continue to communicate with the patients and staff at a distance of eight feet or more. Indeed, the restriction merely is directed at depriving protesters of **the opportunity to intimidate or make other physical contact** with the patients or staff.

Pet. App. at 7a (emphasis added).

Finally, Petitioners incorrectly state that the Colorado Court of Appeals failed to consider two of their arguments. First, they assert that the court did not rule on their argument that the statute was impermissibly viewpoint-based. Pet. at 14. However, the Court of Appeals found that "the specific viewpoint of any person who protests at a health care facility is not relevant to a determination whether a violation of the statute has occurred." Pet. App. at 6a. *See also* Pet. App. at 8a (defining "protest" to include all viewpoints).

Second, Petitioners assert that their overbreadth argument was not addressed. Pet. at 14. In fact, the Court of Appeals addressed this argument. The court explained that the statute

> must be "narrowly tailored," that is, the restrictions must limit free speech only to the extent reasonably necessary to serve a significant governmental interest. Otherwise, the statute is deemed "overbroad." . . .
>
> We hold that § 18-9-122(3) meets the enumerated constitutional requirements.

Pet. App. at 6a-7a. Thus the court determined that the statute was narrowly tailored, and not "overbroad" in the sense that Petitioners use that term. *See* Pet. at 19.

REASONS FOR DENYING THE WRIT

The decision of the Colorado Court of Appeals carefully applied well-established principles of First Amendment law from previous decisions of this Court. The Colorado Supreme Court determined that the decision did not require review. Pet. App. at 19a. The decision below is not in conflict with the decision of any other lower court. Review by this Court is therefore not warranted.

I. THE DECISION BELOW APPLIED THE WELL-SETTLED TEST FOR STATUTES IMPOSING REASONABLE TIME, PLACE OR MANNER REGULATIONS.

Petitioners describe this petition as "afford[ing] this Court the opportunity to dispose of *legislative* schemes" which improperly restrict speech in public forums, and suggest that it parallels issues presented in *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377 (2d. Cir. 1995) (en banc), *cert. granted sub nom. Schenck v. Pro-Choice Network of Western New York*, 116 S.Ct. 1260 (1996). Pet. at 16. Unlike this case, *Schenck* involves the proper scope of an injunction, an area of law which this Court is still clarifying. *See Madsen v. Women's Health Center, Inc.*, 114 S.Ct. 2516 (1994).

The test for a **statute** which regulates speech, however, has long been settled, and requires no further review by this Court:

> Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, and manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

Clark v. Community for Creative Nonviolence, 468 U.S. 288, 293 (1984). *See also Madsen*, 114 S. Ct. at 2524; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Frisby v. Schultz*, 487 U.S. 474, 481 (1988); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The Colorado Court of Appeals applied this test, finding that the statute was content-neutral, narrowly tailored to serve a significant government interest, and left ample alternative channels of communication. Thus, the court concluded that the statute was constitutional. Pet. App. at 6a-7a. There is nothing in the lower court's application of this test requiring review.

Petitioners attempt to portray this case as much more significant than it is. Their petition presents no new legal arguments or theory to this Court. Rather, it merely disputes how the Colorado Court of Appeals applied properly stated rules of law clearly derived from this Court's precedents.

Petitioners argue that the Colorado Court of Appeals applied the wrong standard and that the statute is content-based. Pet. at 19-21. This argument, however, is unsupported by the record, and does not merit this Court's attention.

The applicable standard for determining content neutrality is well-established:

> The principle inquiry in determining content neutrality. . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.

Ward, 491 U.S. at 791 (citations and quotation marks omitted); *see also Madsen*, 114 S.Ct. at 2523. The statute here meets that test. Like the injunction in *Madsen*, it is directed at harmful **conduct** by demonstrators, regardless of their viewpoint. *Id.* at 2523-24. It is not the content of "passing a leaflet or handbill," "displaying a sign," or "engaging in oral protest, education, or counseling" but the threatening and intimidating close **approach** while engaging in these expressive activities which is targeted.

Petitioners apparently do not dispute that the leafletting and sign provisions are content-neutral, but assert that the statute's reference to "oral protest, education, or

counseling" is improperly content-based. Pet. at 20. This argument is inconsistent with the cases cited by Petitioners, which discuss either viewpoint or subject matter discrimination.

As authoritatively construed by the Colorado Court of Appeals, the statute applies to all viewpoints. Pet. App. at 6a, 8a. Contrast this with *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992), striking down a "bias-motivated crime" ordinance that expressly applied to only one side of a debate.

"Protest, education, or counseling" also encompass all topics, as construed by the Colorado Court of Appeals. Pet. App. at 8a.[3] The statute does not apply to only speech on a particular topic, such as labor, *see Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Carey v. Brown*, 447 U.S. 455, 461 (1980), or politics, *see Boos v. Barry*, 485 U.S. 312, 318-19 (1988); *Burson v. Freeman*, 504 U.S. 191, 197 (1992).

The record clearly demonstrates the statute's content-neutrality. As the bill's sponsor expressly stated: "We're not telling people what they can say. They can say anything that, that they want." R.S. 221. During the floor debate another representative explained the statute: "I don't care

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[3] "Counseling and education" referred to "**efforts to present information or guidance** to persons entering or leaving a health care facility;" "protest" referred to "**written or oral communication advocating a viewpoint** on medical treatment or procedures." Pet. App. at 8a (emphases added). The plain language of the statute is not limited to speech on medical treatment, and the part of the Court of Appeals' decision which refers to medical treatment merely provides an example but does not limit the application of the statute to speech on medical topics.

what side you're on. If you're pro or con, stay back eight feet." R.S. 222. The court below followed this Court's precedents in determining that the statute is content-neutral.

Further, the Colorado Court of Appeals found that the statute served the significant government interest of "ensur[ing] the safety and unobstructed access for patients and staff entering and departing from health care facilities" while "not burden[ing] speech more than is reasonably necessary." Pet. App. at 7a. Petitioners apparently dispute this, arguing that the statute is "overbroad" under the *Madsen* decision, and not a "close fit." Pet. at 17-19, 28. Of course, as discussed below, *Madsen* applied the stringent test for injunctions, so that a finding of overbreadth under that test does not translate to overbreadth in a statute.

This Court has long held that a statute is narrowly tailored so long as it promotes a substantial government interest that would be achieved less effectively in its absence. *Ward*, 491 U.S. at 799. The decision below is a straightforward application of this principle.

The statute prohibits only the intrusive format of "forced proximity." It does not ban or suppress leafletting, picketing or speech; it merely draws a narrow eight-foot zone around medical patients and staff where such activities may not be forced upon them. It is hard to imagine what lesser distance would suffice to protect patients from intrusive and inescapable approaches. Thus the statute eliminates the exact source of the evil it was intended to remedy -- focused, forced confrontations, like the focused residential picketing completely banned under *Frisby*, 487 U.S. at 485-87. This is the epitome of narrow tailoring.

II. THE DECISION BELOW IS CONSISTENT WITH *MADSEN*.

The Colorado Court of Appeals was specifically aware of and based its decision upon relevant holdings in *Madsen v. Women's Health Center, Inc.*, 114 S.Ct. 2516 (1994). Pet. App. at 6a. Unlike the injunction reviewed in *Madsen* or the injunction now before the Court in *Schenck*, this case concerns a statute of general applicability, which "represent[s] a legislative choice regarding the promotion of particular societal interests," and carries a lesser risk of censorship than an injunction. *Madsen*, 114 S.Ct. at 2524.

Accordingly, *Madsen* articulated a more rigorous test for injunctions: they must "burden no more speech than necessary to serve a significant government interest." *Id.* at 2525. *Madsen* also makes it clear, however, that the test is simply not applicable to the statute at issue here. *Id.* at 2524.

Petitioners argue that *Madsen* struck down an injunctive provision "functionally similar" to the statute at issue here. Pet. at 19. In reality, the injunctive provision struck down was far broader than Colorado's statute and was analyzed under a stricter test. Further, *Madsen* upheld a method of preserving access to health care more restrictive than the statute here, imposing a 36-foot "speech-free buffer zone" around a medical clinic. 114 S. Ct. at 2526-28. Therefore, under *Madsen* an eight-foot "speech-free buffer zone" around patients as they drew near to health care facilities would be justified. The decision below approves an even less restrictive alternative that allows speech within the buffer zone. This is clearly consistent with *Madsen*.

Petitioners focus on a different provision of the injunction in *Madsen*, which prohibited:

> At all times on all days, in an area within [300] feet of the Clinic, . . . physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [petitioners].

Id. at 2522. This provision included no proximity requirement for the prohibited "approach" with the 300-foot zone, so that a demonstrator who took one step towards a patient located across the street from him would be in violation. Further, access to the clinic was already protected by other provisions of the injunction, including the 36-foot speech free buffer zone. Thus, under the more stringent standard imposed on an injunction, this Court found: "The 'consent' requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic." *Id.* at 2529. The provision improperly prevented all approaches "regardless of how peaceful the contact may be." *Id.*

Colorado's statute, however, applies only within eight feet -- the last two or three steps before physical contact occurs. A focused, targeted approach by a stranger shouting slogans at a distance closer than eight feet is experienced by most people as a threat. R. 262. Because such a close approach is "so infused with violence as to be indistinguishable from a threat of physical harm," *see Madsen*, 114 S.Ct. at 2529, it is properly subject to regulation. Thus, because the facts and the legal standard concerning the *Madsen* "no-approach" provision were different, the decision below does not conflict with *Madsen*.

For the same reasons, resolution of the issues currently before the Court in *Schenck* will be of limited application here. That case also involves an injunction, which imposed a broader 15-foot mobile buffer zone around clinic property, people, and cars, not limited to a 100-foot or even 300-foot zone surrounding the clinic. Thus the facts and the legal standard are again different.

Petitioners also argue that the statute is overbroad under *Madsen* because it regulates all approaches rather than only approaches of patients and staff of medical facilities. Pet. at 18. Neither *Madsen* nor any other decision of this Court turn on such a distinction. The Colorado General Assembly made the legislative choice that it would not require patients and staff to identify themselves in order to benefit from the protection of the statute. Further, families and friends of patients also merit protection. *See Madsen*, 114 S. Ct. at 2528 ("patients and relatives alike often are under emotional strain and worry") (quotation marks and citations omitted).

III. THE DECISION BELOW MERELY APPLIES A LONG-SETTLED DEFINITION OF PRIOR RESTRAINT.

Petitioners argue that "[t]he decisions below exalted form over substance," Pet. at 24, because they found that the prior restraint doctrine applies only to the actions of government officials. Pet. App. at 9a, 17a. Petitioners attack the statute because "nothing in [it] compels the public to grant consent" to approach their persons. Pet. at 22. The decision below, however, is correctly based on the "fundamental tenet of our Constitution. . . that the government is subject to constraints which private persons

are not," *ISKCON v. Lee*, 112 S.Ct. 2711, 2717 (1992) (Kennedy, J. concurring).

This Court need not even reach that issue, however, because the statute does not prevent expression of a message, the basic test for a prior restraint. *See Madsen*, 114 S. Ct. at 2524 n.2 (injunction was not a prior restraint: "[Demonstrators] are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot buffer zone."). Here demonstrators may express their messages in any one of a number of ways; they are simply prohibited from expressing them within the eight-foot bubble for unconsenting targets.

The Court of Appeals was "not aware of any authority that would extend this doctrine" to a private citizen, Pet. App. at 9a, because this Court has consistently found that prior restraints give "**public officials** the power to deny use of a forum in advance of actual expression." *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (emphasis added).[4] Petitioners have not cited a

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[4] *See also Riley v. National Federation of the Blind*, 487 U.S. 781, 802 n.14 (1988) ("**Secretary of State** has unbridled discretion"); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988) ("unbridled discretion of a **government official**"); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (same); *Secretary of State v. J.H. Munson Co.*, 467 U.S. 947, 964 n. 12 (1984) ("unguided discretion of the **Secretary of State**"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) ("**licensing officials**" had unbridled discretion); *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) ("overly broad licensing discretion to an **administrative office**"); *Cox v. Louisiana*, 379 U.S. 536, 557 (1965) ("such broad discretion in a **public official**"); *Kunz v. New York*, 340 U.S. 290, 293 (1951) (discretionary power in "**administrative official**"); *Saia v. New*

single authority applying the prior restraint doctrine to the decisions of private individuals; their argument does not merit review by this Court.

IV. THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT AND FEDERAL CIRCUIT COURTS.

Petitioners assert that the decision below conflicts with *United Food and Commercial Workers International Union v. IBP, Inc.*, 857 F.2d 422 (8th Cir. 1988), and *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401 (N.D. 1992). Pet. at 25-27. Those decisions, however, invalidated far broader restrictions on speech under more stringent standards and thus their holdings are inapplicable to the decision below.

In *IBP*, the Eighth Circuit addressed the constitutionality of a Nebraska labor picketing statute, which prohibited, among other activities:

> Using threatening language toward [another] person or any member of his or her immediate family, or in his, her or their presence or hearing, for the purpose of inducing or influencing, or attempting to induce or influence, such person to quit his or her employment, or to refrain from seeking or freely entering into employment, or by

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York, 334 U.S. 558, 560-61 (1948) ("uncontrolled discretion of the **Chief of Police**"); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940) ("determination by **state authority**") (all emphases added).

> persisting in talking to or communicating in any manner with such person or members of his or her immediate family against his, her or their will, for such purpose.

857 F.2d at 425 n.4. Thus the statute imposed an unlimited ban on speech, with no place restrictions, and was expressly content-discriminatory. *See Boos v. Barry*, 485 U.S. 312, 321 (such regulations subject to exacting scrutiny). Contrary to Petitioners' assertions, the statute was not defended on the grounds that "unwelcome words are unprotected words." Pet. at 25. Rather, the state argued that the statute should be construed to apply only to "fighting words." *Id.* at 433. The Eighth Circuit declined to so drastically rewrite the statute, and so agreed with the district court that the provision was improperly content-based. *Id.* at 424, 435. Nothing in the circuit court's analysis in *IBP* is concerned with the constitutionality of a narrow place restriction like that in the statute here.

In *Fargo Women's Health*, the North Dakota Supreme Court considered the constitutionality of an injunction restricting protests outside an abortion clinic. The court upheld most of the injunction, but struck down a provision which prohibited "speaking to staff and patients of [the clinic] who indicate that they do not wish to be spoken to." 488 N.W.2d at 407 n.1. The court's entire analysis was contained in one sentence: "However, 'speaking' to staff and patients cannot be constitutionally enjoined." *Id.* at 411. The injunction also prohibited:

> distributing leaflets or brochures to any person who has indicated orally or by gesture that such person does not wish to receive such literature.

Id. at 407 n.1. Again, the court struck this down with a one-sentence analysis: "Obviously, distributing literature is protected communicative activity and a complete ban violates the First Amendment." *Id.* at 411.

The injunctive provisions stricken in *Fargo Women's Health* contained no place limitations whatsoever, unlike the statute here. Further, in the same decision the North Dakota Supreme Court upheld a prohibition against "harassing" or "intimidating" patients and staff. *Id.* at 410-11. Following a remand for more factual findings, it also upheld a provision of the injunction which excluded all but two peaceful picketers from a "protected zone" extending **100 feet from the clinic property line.** *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 502 N.W.2d 536 (N.D. 1993). Thus, the decisions of the North Dakota Supreme Court are consistent with the narrow eight foot restriction upheld below.

The decision below is in fact consistent with many other decisions of the courts of appeals and state courts of last resort, upholding various buffer zones as necessary to protect access to clinics and to protect patients from undue stress. *See, e.g., Sabelko v. City of Phoenix*, 68 F.3d 1169 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3625 (U.S., March 4, 1996) (No. 95-1415) (upholding ordinance with eight-foot bubble); *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 898 P.2d 402 (Cal. 1995), *petition for cert. filed*, 64 U.S.L.W. 3287 (U.S. Oct. 10, 1995) (No. 95-576) (upholding injunction which placed demonstrators more than 60 feet from clinic sidewalk, across a busy four-lane street); *Horizon Health Center v. Felicissimo*, 659 A.2d 1387 (N.J.Super. Ct. App. Div. 1995), *certification denied*, 667 A.2d 191 (N.J. 1995) (modifying injunction to allow "quiet sidewalk counselling" by no more than four individuals "who must stop counselling when a targeted individual indicates a

desire to be left alone"); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988) (upholding 25 foot "free zone"); *Hirsh v. City of Atlanta*, 401 S.E.2d 530 (Ga.), *cert. denied*, 501 U.S. 1221 and 502 U.S. 818 (1991) (upholding injunction imposing five-foot bubble within 50 feet of clinic property), *Bering v. SHARE*, 721 P.2d 918 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050 (1987) (upholding injunction which placed demonstrators around the corner from clinic entrance). There is no conflict between the decision below and decisions of other courts which would necessitate review by this Court.

V. THE DECISION BELOW PRESENTS NO NEW OR IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW.

Petitioners argue that this case presents important principles of constitutional law needing resolution by this Court. Pet. at 27. In reality, Petitioners seek review of a statute and a decision which simply applied previous precedents of this Court.

Petitioners attack the statute because it does not protect access by prohibiting obstructions, trespass, assaults or threats. Pet. at 28. As discussed above, the statute specifically targets obstructive and threatening conduct entwined with speech. Although Petitioners might write a different statute, their disagreement with the reasonable means chosen by the Colorado General Assembly is not sufficient reason for this Court's review. *See Ward*, 491 U.S. at 800. As noted, buffer zones previously approved by this Court are a more restrictive means of preserving access to health care. There is no need to review Colorado's

decision to employ an even narrower restriction, which prohibits unconsented approaches that are tantamount to threats, while preserving the ability to "reach the minds of willing listeners." *See Kovacs v. Cooper*, 336 U.S. 77, 87 (1949).

Petitioners attack the statute for incorporating what they call an "audience veto" principle, and cite cases striking down "heckler's vetoes." Pet. at 28. This merely reflects a misunderstanding of the heckler's veto doctrine. The statute was carefully written to avoid a heckler's veto and allow the decision on approach to be made by each individual only for that individual. It regulates only displaying a sign or passing a leaflet **to** or counseling **with** another person without **that person's** consent. This is not the same as the classic "heckler's veto": allowing a hostile mob to force an unpopular speaker off the streets. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

This Court has long recognized the need to balance privacy and expressive activity, even on the public streets. "A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). Demonstrators may not "insist upon a constitutional right to form a cordon across the street and allow no pedestrian to pass who did not accept a tendered leaflet." *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939). There is "a substantial and justifiable" state interest in regulating speech "directed primarily at those who are presumptively unwilling to receive it." *Frisby v. Schultz*, 487 U.S. 474, 488 (1988).

The use of a consent requirement to balance competing rights is in accord with this Court's decisions.

Rowan v. U.S. Post Office, 397 U.S. 728 (1970), upheld a statute which allowed an individual to invoke the power of the Post Office to prohibit delivery of mail which the individual found offensive, noting that leaving the decision to the individual avoided "constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a government official." 397 U.S. at 737. *See also Breard v. City of Alexandria*, 341 U.S. 622 (1951) (restriction on unwanted commercial solicitation upheld).

Consistent with this Court's pronouncements, the decision below recognizes that those outside health care facilities must still "tolerate insulting, and even outrageous, speech," *see Madsen*, 114 S. Ct. at 2529, but from eight feet away, decreasing the threat without cutting off communication. Petitioners' arguments against the statute implicitly rely on the completely unsupported principle that citizens who wish to avoid being pursued, surrounded, and threatened by demonstrators must never venture onto the public streets, even to seek needed medical services. This is not and has never been the law of this Court:

> For the right to communicate is not limitless. Even peaceful picketing may be prohibited when it interferes with the operation of vital governmental facilities. . . . Moreover, we have often declared that "[a] state or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech *irrespective of content*." In sum, "no mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the

> tranquility of spots selected by the people either for homes. . . or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals."

Carey v. Brown, 447 U.S. 455, 470-71 (1980) (citations omitted).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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No. 95-1905

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LEILA JEANNE HILL, *et al.*, *Petitioners*,

v.

THE STATE OF COLORADO,
ROY ROMER, GOVERNOR, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
Court of Appeals of the State of Colorado

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INTRODUCTION

The Colorado Bubble Zone Statute, C.R.S. § 18-9-122(3) (1995 Cum. Supp.),[1] is one of the most extreme impositions on orderly discourse in the public forum with which Petitioners and their counsel have ever been acquainted. That statute, which imposes a direct prohibition on leafletting, sign displays, and oral advocacy in the traditional public forum, directly abrogates the "exercise of . . . basic constitutional rights in their most pristine and classic form[.]" *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

In *Schenck v. Pro Choice Network of Western New York*, No. 95-1065, this Court has granted review to consider the constitutionality of a bubble zone imposed via injunction which allows the target of communication to cut off further speech by expressing the desire to be left alone. In Colorado, the Bubble Zone Statute prohibits all efforts at oral counseling, oral education, and oral protest, within eight feet of another person unless consent is first obtained. C.R.S. § 18-9-122(3).

Petitioners have urged this Court either to grant this Petition or to hold it pending a decision in *Schenck*. With an audacity not to be discounted, Respondents have determined — in advance of this Court's disposition of *Schenck* — that "resolution of the issues currently before the Court in *Schenck* will be of limited application here." Br. in Opp. at 14. At its base, that pronouncement by Respondents is of the same

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1. As Respondents noted, "[t]he version of § 18-9-122 reprinted in the petition for writ of certiorari contained a typographical error . . . ." Br. in Opp. at 1. For the Court's convenience, the typographical error mentioned, but not identified, by Respondents was the unintentional omission of a comma following the word "section" in the excerpt of C.R.S. § 18-9-122(4), *see* Pet. at 3.

cloth as their utter rejection of this Court's directly applicable holding in *Madsen v. Women's Health Center, Inc.*, 512 U.S. ___, 114 S. Ct. 2516, 2529 (1994), striking down an indistinguishable "consent to speak" requirement imposed by injunction. Respondents' advance declaration of disinterest in whatever holding this Court may make in *Schenck* only serves to underscore the importance of granting this Petition.

REPLY ARGUMENT

I. RESPONDENTS FAIL TO EXPLAIN AWAY THE DIRECT CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S DECISION STRIKING DOWN THE "NO APPROACH" ZONE IN *MADSEN*.

In *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2529 (1994), this Court struck down the provision of an injunction that barred enjoined parties from approaching others without their consent while within 300 feet of the medical facility involved in that case. 114 S. Ct. at 2522, 2529. That holding was unqualified.

Respondents tacitly concede that, subjected to the rigorous consideration applied in *Madsen* to the "no approach" zone, C.R.S. § 18-9-122(3) would not survive constitutional scrutiny. Br. in Opp. at 12-14. For this reason, Respondents ignore the direct holding on point in *Madsen*, 114 S. Ct. at 2529 ("[t]he 'consent' requirement alone invalidates this provision"). Instead, they argue that this Court's decision in *Madsen* is uninformative in the context of a challenge to a ***legislative*** act imposing a "consent" requirement.

Faced with the certainty of this Court's holding in *Madsen*, Respondents have lighted upon three possible distinctions between the Colorado Bubble Zone Statute and the "no approach" zone struck down *Madsen*. Those points of distinction are: (1) the sizes of the geographical areas within which the two provisions operate, Br. in Opp. at 12-13; (2) the sizes of the "bubbles" within those zones, *id.* at 13; (3) and, the difference between injunctions and statutes, *id.* at 7-8, 12. None of those points of distinction has merit.

A. In *Madsen*, 114 S. Ct. at 2529, this Court struck down an injunctive provision that prohibited those enjoined from

> At all times on all days, in an area within [300] feet of the Clinic, . . . physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [petitioners].

114 S. Ct. at 2522 (quoting *Operation Rescue v. Women's Health Center*, 626 So. 2d 664, 679-680 (Fla. 1993)). Thus, the "no consent" provision operated within 300 feet of the facility. Under C.R.S. § 18-9-122(3), the "consent" requirement operates within 100 feet of the entry door to a health care facility.

The size of the geographic zone within which the "no approach" zone operated was not a factor in this Court's constitutional analysis in *Madsen*. Rather than holding, as Respondents suggest, Br. in Opp. at 12-13, that it was the size of the 300 foot zone that compelled invalidation of the "no approach" provision, this Court focussed on a completely distinct issue: the requirement of consent. "The 'consent' requirement alone invalidate[d]" the "no approach"

provision. 114 S. Ct. at 2529. Respondents' attempt to distinguish *Madsen* by pointing to the difference in geographical size of the affected zones is unavailing.

B. In Respondents' view, this Court struck the "no approach" zone at issue in *Madsen*, at least in part, because of the size of the personal "no approach" bubble. *See* Br. in Opp. at 13 ("[t]his provision included no proximity requirement for the prohibited 'approach'"). But again, Respondents can only invoke *Madsen* by ignoring its directly controlling holding. Nothing in *Madsen* suggests that it was the size of the bubble zone that led to its invalidation. 114 S. Ct. at 2529. Rather, what this Court found dispositive of this question was the "'consent' requirement ***alone*** . . . ." *Id.* (emphasis added).

C. Ultimately, Respondents' argument is that the Bubble Zone Statute survives constitutional scrutiny because, unlike the injunctive "no approach" zone struck down in *Madsen*, the Bubble Zone emanated from an act of the legislative branch of government. Br. in Opp. 11, 12-14. Consequently, Respondents argue, the Bubble Zone Statute faces less rigorous analysis.[2] Even in this argument, Respondents can be seen running from the text and holding of *Madsen* that directly control the questions in this case.

This Court's uncomplicated holding

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2. Of course, even in that argument, Respondents are mistaken. A less rigorous standard of review will not be applied to a generally applicable statute ***unless it is content-neutral***. *Madsen*, 114 S. Ct. at 2524. Here, the Colorado Bubble Zone Statute is manifestly not a content-neutral statute. *See* Pet. at 19-20.

"[t]he 'consent' requirement alone invalidates this provision . . . ,"

114 S. Ct. at 2529 (emphasis added), leaves no room to doubt whether peaceful exercises of the right to freedom of expression in the traditional public forum can be made subject to the whimsy of private anti-speech posses. "The 'consent' provision alone" invalidated the *Madsen* "no approach" zone, and only by rejecting or ignoring *Madsen* can Respondents and the court below fail to see that the same requirement of consent to speak invalidates C.R.S. § 18-9-122(3).

II. THE BUBBLE ZONE STATUTE DOES NOT TARGET "FORCED COMMUNICATIONS," AS RESPONDENTS IMPLY, BUT DOES PROHIBIT THE PEACEFUL, NONVIOLENT EXPRESSION OF THE PETITIONERS.

Respondents' clever but misleading use of quotation marks could lead one to the quite fallacious conclusion that the Bubble Zone Statute, C.R.S. § 18-9-122(3), simply prohibits "'forced proximity[,]'" Br. in Opp. at 4, and leaves the peaceful communicant to the unaffected exercise of fundamental constitutional rights. Two roadblocks stand between Respondents and their insupportable assertion: first, the Bubble Zone Statute does not even purport to be a regulation of the use of force or of proximity ***without communication***; and second, the Bubble Zone Statute does regulate peaceful, unobstructive expression.

The provision at issue in this litigation states:

> No person shall knowingly approach another person within eight feet of such person, unless such other person

> consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

C.R.S. § 18-9-122(3) (1995 Cum. Supp.).[3]

Conspicuously absent from this provision is any restriction on either proximity as such (whether forced or not) or the use of force in aid of communication. Nonetheless, Respondents repeatedly mischaracterize the Bubble Zone Statute in a manner suggesting that the Statute's scope is limited to the prevention of such force.[4] Although

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3. Nothing in the record in this case nor in the record of the legislative hearing referred to by Respondents supports any imputation of unlawful, forceful, threatening or intimidating conduct to the Petitioners. Rather, as the trial court held, "[t]here is no question that the Plaintiffs['] conduct implicates First Amendment rights." Pet. App. at 12a. Petitioners do not use force or intimidation. *Id.* Consequently, Petitioners did not challenge a separate provision of Colorado law, enacted with the Colorado Bubble Zone Statute, which makes it a misdemeanor to "knowingly obstruct[], detain[], hinder[], impede[], or block[] another person's entry to or exit from a health care facility." C.R.S. § 18-9-122(2) (1995 Cum. Supp.). Rather, Petitioners have always contended that the legitimate interests of the government in securing access to medical facilities was better served by restrictions on obstructive and intimidating conduct, not on peaceful exercises of the right to freedom of speech.

4. *See* Br. in Opp. at 4 ("interfering with access through intimidating 'forced proximity'"); *id.* at 9 ("the threatening and intimidating close approach while engaging in these expressive activities . . . is targeted"); *id.* at 11 ("the statute eliminates the exact source of the

the Colorado Bubble Zone provision is barren of any restriction on the use of force or intimidation, it directly restricts paradigmatic expression: leafletting, sign displays, and oral advocacy — no matter how peaceful, no matter whether directed at patients or passersby — are all suppressed. The statute prohibits ***speech***, not forced proximity.[5]

III. THE PRIOR RESTRAINT CREATED BY C.R.S. § 18-9-122(3) IS ENFORCED IN THE SAME WAY AS OTHER PRIOR RESTRAINTS CONSIDERED BY THIS COURT.

Respondents dispute the application of the prior restraint doctrine to the consent requirement imposed by the Bubble Zone Statute, *see* Br. in Opp. at 14-16. Tellingly, Respondents do not deny that the statute plainly compels peaceful, nonviolent communicants in the traditional public forum to seek consent before engaging in protected expression. Respondents contend that the prior restraint doctrine is inapplicable because, unlike other prior restraints consider by this Court, the required consent must be gotten from ***private persons*** rather than ***public officials***.

Respondents' distinction is one without a constitutional difference. The constant theme of a prior restraint is that it

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evil it was intended to remedy – focused, forced confrontations"); *id.* at 13 ("[a] focused, targeted approach by a stranger shouting slogans"); *id.* at 19 ("the statute specifically targets obstructive and threatening conduct entwined with speech"); *id.* at 21 ("citizens who wish to avoid being pursued, surrounded, and threatened by demonstrators").

5. Indeed, there is nothing in the Colorado Bubble Zone provision that outlaws forced proximity ***unless the person seeks to communicate***. A more direct penalization of free speech is difficult to imagine.

outlaws — and punishes — expression, no matter how peaceful, simply for lack of permission (whether from a licensor or from a court).[6] That Colorado has delegated licensing authority to passersby is no more relevant than if the City of Birmingham had required civil rights marchers to obtain permission from the owners of property adjoining the street in question.

Respondents also contended that because speech may still occur outside of the bubble zone, the zone is not a prior restraint. Br. in Opp. at 15. This Court has rejected the argument. *See Southeastern Promotions, Ltd.*, 420 U.S. at 556-57 n.8 ("[a] licensing system need not effect total suppression in order to create a prior restraint") (citing cases).

Respondents would have this Court countenance their unconstitutional licensing scheme because constitutionally protected rights may be exercised someplace else without a

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6. *Cf. Secretary of State of Md. v. Jos. H. Munson Co.*, 467 U.S. 947, 804 (1984) ("fundraising activity illegal" absent compliance with charitable registration statute); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (use of the municipal auditorium without a permit); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (publication of national security information in violation of federal court order would be subject to contempt prosecution under Title 18 U.S.C. § 401); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (crime to parade without permit); *Freedman v. Maryland*, 380 U.S. 51 (1965) (crime to exhibit motion picture without a license); *Cox v. Louisiana*, 379 U.S. 536, 553-58 (1965) (crime to obstruct public passage unless permission obtained in advance from city officials); *Kunz v. New York*, 340 U.S. 290, 290-91 (1951) (crime to hold public meeting without a permit); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (same); *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940) (unlicensed solicitations for religious, charitable and philanthropic causes "a crime"); *Hague v. CIO*, 307 U.S. 496, 502 n.1 (1939) (crime to parade or picket without permit).

need for consent. Again, this Court has long since rejected this argument: "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). The Bubble Zone Statute, however, operates in traditional public fora, *see* Pet. at 8, Pet. App. at 12a, the quintessential "appropriate places" for free speech.

IV. RESPONDENTS HAVE NOT DISPELLED THE CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF THE EIGHT CIRCUIT AND THE NORTH DAKOTA SUPREME COURT.

Respondents have failed to dispel the existence of a direct conflict between the decision below and the decisions of the Eighth Circuit and of the North Dakota Supreme Court. *Pet.* at 25-27. Respondents ignore the functional similarity of the Bubble Zone Statute to the statute in *United Food and Commercial Workers Int'l Union v. IBP*, 857 F.2d 422 (8th Cir. 1988), and to the injunction in *Fargo Women's Health Organization v. Lambs of Christ*, 488 N.W.2d 401 (N.D. 1992). Respondents' quibbling only serves to emphasize the need for this court to grant the petition and review the decision below, so that the growing constitutional confusion of the lower courts can be eliminated.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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